

No. 48481-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

ANTHONY G. HAND, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

REPLY BRIEF OF APPELLANT

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Graham, WA
253-445-7920

Marie J. Trombley
WSBA 41410

TABLE OF CONTENTS

I. ISSUES RELATED TO ASSIGNMENT OF ERRORS IN REPLY	1
II. STATEMENT OF FACTS IN REPLY	1
III. ARGUMENT	1
A. The State Incorrectly Argues That Mr. Hand Raised A Sixth Amendment Right To A Speedy Trial Challenge.....	1
B. Mr. Hand's Guaranteed Constitutional Right To Substantive Due Process Was Violated By The 76-Day Delay Between The Issuance Of A Court Order And Compliance With That Order.	2
C. The Trial Court Was Authorized To Dismiss The Criminal Charges.....	7
D. This Court Is Authorized To Decline To Impose Appellate ... Costs.	13
IV. CONCLUSION.....	14

TABLE OF AUTHORITIES

Washington Cases

<i>Det. of D.W.</i> , 181 Wn.2d 201, 207, 332 P.3d 423 (2014)	11
<i>In re Personal Restraint of Fleming</i> , 142 Wn.2d 853, 862, 16 P.3d 610 (2001) ...	4
<i>State v. Kidder</i> , ---P.3d ---2016 WL 7468217	5
<i>State v. Michelli</i> , 132 Wn.2d 229, 239, 937 P.2d 587 (1997)	12
<i>State v. Motter</i> , 139 Wn.App. 797, 802,n.3, 162 P.3d 1190 (2007)	13

U.S. Supreme Court

<i>Pate v. Robinson</i> , 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966)	4
<i>Reno v. Flores</i> , 507 U.S. 292, 301-302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) ..	10
<i>Washington v. Glucksberg</i> , 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)	10

Federal Cases

<i>Oregon Advocacy Center, v. Mink</i> , 322 F.3d 1101, 1120 (9 th Cir. 2003)	2
<i>Trueblood v. DSHS</i> , 2016 WL 4418180 (2016)	3
<i>Trueblood v. Wash. State Dept. of Social & Health Services DSHS</i> , 101 F. Supp.3d 1010, 1014 (W.D. Wash.2015)	5
<i>Trueblood v. Washington State Dept. of Social and Health Services</i> , 822 F.3d 1037, 1044 (9 th Cir. 2016)	2

Statutes

RCW 10.73.160(1)	14
RCW 10.77.050	4
RCW 10.77.060(1)(a)	4
RCW 10.77.084(1)(a)	4
RCW 10.77.084(1)(b)(2012)	7
RCW 10.77.086(1)(a)(i)(ii)(b)	7

Rules

CrR 8.3(b)	12
RAP 14.2	13
RAP 15.2(f)	13
RAP 2.5(a)	13

I. ISSUES RELATED TO ASSIGNMENT OF ERRORS IN REPLY

A. In Reply, Does The State Incorrectly Argue That Mr. Hand Raised A Sixth Amendment Right To Speedy Trial ?

B. Was Mr. Hand's Constitutional Right To Due Process Violated Where The State Failed To Transfer Him For Competency Restoration Until 31 Days After The 45- Day Period For Restoration Had Already Expired?

C. Was Dismissal The Correct Remedy?

D. This Court Is Authorized To Decline To Impose Appellate Costs.

II. STATEMENT OF FACTS IN REPLY

Mr. Hand incorporates the statement of facts from the appellant's opening brief.

III. ARGUMENT

A. The State Incorrectly Argues That Mr. Hand Raised A Sixth Amendment Right To A Speedy Trial Challenge.

In its response brief, the State argues that Mr. Hand's substantive due process challenge is actually a claim of a violation of his Sixth Amendment right to a speedy trial. It then complains that the appellant did not assign error to it, nor provide any authority

to support it. (Br. of Resp. p. 5-14). Mr. Hand did not raise a Sixth Amendment challenge on appeal. Competency related delays are not relevant to a speedy trial inquiry. *Trueblood v. Washington State Dept. of Social and Health Services*, 822 F.3d 1037, 1044 (9th Cir. 2016). Constitutional questions regarding confinement of incompetent pretrial criminal defendants are analyzed under the due process clause. *Oregon Advocacy Center, v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003). Mr. Hand raised a Fourteenth Amendment and Article 1 § 3 State Constitution challenge.

B. Mr. Hand's Guaranteed Constitutional Right To Substantive Due Process Was Violated By The 76-Day Delay Between The Issuance Of A Court Order And Compliance With That Order.

Due process analysis governs pretrial detention: "Freedom from imprisonment- from government custody, detention, or other forms of physical restraint- lies at the heart of the liberty that [the Due Process] Clause protects." *Trueblood*, 822 F.3d at 1042. Pretrial detainees have not been convicted of any crime and the circumstances of their confinement, whether they are declared incompetent or not, are properly addressed under the due process clause of the Fourteenth Amendment. *Id.* at 1043.

The State's response brief argues "Mink's balancing test only applies to those incarcerated solely due to their incapacity to proceed to trial" and there was no due process violation here because Mr. Hand's "incarceration for competency restoration was ancillary to the incarceration attending his inability to post the bail imposed on pending charges." (Br. of Resp. p.23). In other words, the due process rights of an indigent criminal defendant, who has been found incompetent and cannot post bail, are not violated when he is deprived of court ordered restorative treatment because he would be confined anyway.

Mink does not stand for that proposition: in very stark terms the Court reasoned,

Holding incapacitated criminal defendants in jail for weeks or months violates their due process rights because the nature and duration of their incarceration *bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals.*

Mink, 322 F.3d 1122 (see also, *Trueblood v. DSHS*, 2016 WL 4418180 (2016) *Slip Op.* *5).

The State's analysis and conclusion directly opposes the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article 1, §3 of the Washington State Constitution.

Federal and State Constitutions provide that no person shall be deprived of life, liberty or property without due process of law. It is fundamental well-settled federal and state law that an incompetent person may not stand trial. *Pate v. Robinson*, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *In re Personal Restraint of Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). RCW 10.77.050 provides that no incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.

The Washington legislature has explicit mandated procedures that protect substantive due process rights: where there is reason to doubt competency the court must order an expert evaluation. If the court finds a criminal defendant to be incompetent, it is directed to stay the criminal proceedings and commit the defendant for competency restoration treatment. RCW 10.77.060(1)(a);RCW 10.77.084(1)(a);RCW 10.77.086(1)(a)(2013).

The trial court here followed the legislative mandate: it ordered the mental competency evaluation and report. It found Mr. Hand incompetent and stayed the proceedings. It ordered Mr. Hand committed to WSH for competency restoration treatment under RCW 10.77.086(1)(a). Pretrial detainees needing

competency restoration services have a substantive due process right to those restoration services. *Mink*, 322 F.3d at 1121.

In a recent published opinion, *State v. Kidder*, ---P.3d --- 2016 WL 7468217¹, the Court reviewed the dismissal of criminal charges against an incompetent criminal defendant who remained in jail for over 139 days after the State was ordered to provide restorative treatment. *Kidder*, *12. As in Mr. Hand's case, the State's attorney general acknowledged Kidder was a member of the class certified by the district court in *Trueblood*. *Id.* *15. The certified class included:

All persons who are now, or will be in the future, charged with a crime in the State of Washington and (a) who are ordered by a court to receive competency evaluation or restoration services through the Washington State Department of Social and Health Services ("DSHS"); (b) who are waiting in jail for those services; and (c) for whom DSHS receives the court order.

Trueblood v. Wash. State Dept. of Social & Health Services DSHS, 101 F. Supp.3d 1010, 1014 (W.D. Wash.2015).

The Court found the undisputed record established Kidder did not receive the restoration services before the expiration of the commitment period: "Other than the initial in-jail competency

¹ The opinion in *State v. Kidder* was filed December 27, 2017. The mandate in *State v. Kidder*, was due January 26, 2017.

evaluation and recommendation for restoration treatment, no determination of competency by a mental health professional was made before expiration of the 90 day order for commitment.” *Id.*

*22. The Court held the record established the State’s failure to provide Kidder with restorative treatment within a reasonable time violated her right to due process. *Id.* *24.

Similarly, here the court found Mr. Hand incompetent to stand trial on December 24, 2014. (CP 18-27). It ordered the State to provide a 45-day competency restoration treatment within 15 days “pursuant to the *Trueblood* decision.” (12/24/14 RP 6; CP 30-32; 302-304). By January 19, 2015, twenty six days later, Mr. Hand remained in the jail. (CP 34). Forty nine days after the trial court had ordered transport to Western State Hospital (WSH) and five days after the restoration period had ended, Mr. Hand remained in jail. Sixty days after the court ordered treatment, the court found the State in violation of its order and imposed sanctions of \$500 per day. (2/25/15 RP 8).

Seventy days after the court ordered restoration services, the court heard the motion to dismiss the charges or to release Mr. Hand. (CP 98; 3/4/2015 RP 1-8). He presented information to the court that his family could assist him and he could quickly obtain

Medicaid benefits for needed mental health treatment. (3/4/2015 RP 6). The court declined to grant any relief and specifically found there was no due process violation. (3/4/2015 RP 11).

Like Kidder, Mr. Hand remained in jail despite repeated court orders to transport him to WSH and sanctions to coerce compliance. Like *Kidder* and other members of the class certified by *Trueblood*, Mr. Hand's right to due process was violated.

C. The Trial Court Was Authorized To Dismiss The Criminal Charges.

RCW 10.77 requires the court to order incompetent defendants commitment to a facility for restoration treatment once they have been found incompetent. For a Class C or nonviolent Class B felony, the restoration period is *up to forty-five days*. RCW 10.77.086(1)(a)(i)(ii)(b). Protection of the due process rights of criminal defendants with mental disabilities that make them incompetent to stand trial is provided for in RCW 10.77.084(1)(b)(2012):

At the end of the mental health treatment and restoration period, if any, or at any time a professional person determines competency has been, or is unlikely to be restored, the defendant shall be returned to court for a hearing ... *if competency has not been restored, the proceedings shall be dismissed without prejudice.*

The statute provides two paths for criminal proceedings to be dismissed: if at the end of the restoration period competency has not been restored *or* at any time a professional person determines competency is unlikely to be restored.

Under the statute, the court should have dismissed the criminal charges against Mr. Hand at the expiration of the 45-day restoration period. The record shows that the competency evaluation report concluded that Mr. Hand could not rationally assist in his own defense: he lacked the capacity to adequately attend to court proceedings; to rationally consider facts and make meaningful decisions regarding the pending proceedings; to testify on his own behalf; or to communicate with his attorney in a rational manner. (CP 26). The evaluator further concluded that absent medication his prognosis would be poor; he was not a danger to others; and his lifestyle instability impeded his ability to provide for his own basic needs of health and safety. (CP 26-27).

The court found Mr. Hand incompetent to proceed to trial. Prior to the expiration of the 45-day commitment period, Mr. Hand received no competency restoration services; by the expiration of

the 45- day competency restoration period there was no report from a professional that competency had been restored.

The State's response brief claims: "Defendant could have requested release pending transfer or sought an injunction requiring transfer, but he did neither." (Brief of Respondent p. 12). The record shows otherwise. Mr. Hand sought a dismissal, a release while he awaited transport to WSH and a show cause hearing for the State to explain its violation of the court order. The State was sanctioned for failure to transport Mr. Hand.

On January 25, 2015, Mr. Hand specifically asked the court to dismiss his case based on a violation of his right to due process or to transfer his case to the mental health court. (CP 34-38). On February 11, 2015, defense counsel filed a motion to either dismiss or to order WSH to show cause why it should not be held in contempt. (CP 39-40).

On February 25, 2015, approximately 60 days after the court ordered Mr. Hand transported to WSH, the attorney general's office urged the court to order Mr. Hand's release to correct any constitutional deficiencies. (CP 50). The following week Mr. Hand asked for the second time that the charges be dismissed or that he be released. (CP 98). He presented information to the court that

his family was ready and able to assist him if he were released on personal recognizance and he could immediately obtain Medicaid benefits for needed mental health treatment. (3/4/2015 RP 6). The court declined to grant relief. (3/4/2015 RP 11). The court erred when it did not release Mr. Hand and dismiss the charges without prejudice.

It is incumbent on this Court to consider whether the violation of whether violating Mr. Hand's due process rights warrants a dismissal of charges *with* prejudice. The Due Process Clause guarantees more than fair process: it "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). "The Fourteenth Amendment 'forbids the *government* to infringe...'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Glucksberg*, 521 U.S. at 721 (citing *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)) (emphasis in the original and added).

The federal court in *Trueblood* has already held that Washington State DSHS, a State agency, violated the liberty rights

of individuals like Mr. Hand: Individuals who faced criminal charges, were found mentally incompetent to proceed to trial, and were left to wait for weeks and months in jails until provided admission to a state hospital. *Trueblood*, 73 F.Supp.3d 1313. The federal court prohibited the State from delaying competency restoration services for these defendants. *Id.*

Similarly, the Washington Supreme Court has been very clear: “Anyone detained by the State due to incompetency has a *constitutional* right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition.” *Det. of D.W.*, 181 Wn.2d 201, 207, 332 P.3d 423 (2014)(internal citations omitted; emphasis added).

Mr. Hand had not been convicted of a crime, yet, he was forced to wait in jail for 76 days before the State complied with the trial court’s order. As an incompetent, indigent criminal defendant, his constitutional right to due process was violated.

The only consequence, however, provided no remedy for Mr. Hand. Rather, the trial court imposed financial sanctions on DSHS, to accrue until the State agency complied with the court order. This consequence, brings no relief to Mr. Hand, the

individual harmed by the State's lack of action and noncompliance with the order.

The Court may apply CrR 8.3(b) which provides:

The court, In the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or *governmental* misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

The rule does not limit itself to prosecutors and law enforcement officers as government actors. By its own terms, the rule includes all arms of the State as it refers to "governmental" actions. The State unpersuasively argues there is no showing of deliberate action by the State that was not simply administrative. (Br. of Resp. at 19). Simple mismanagement is sufficient and failure to comply with court orders is governmental mismanagement at best and misconduct at worst. *State v. Michelli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

Infringement on an accused's constitutional right to due process demands a remedy. This Court has the authority to dismiss a case under appropriate circumstances, and is not limited to a trial court's rationale for a particular decision. Rather, the

Court may affirm or reverse “on any ground established by the law and the record.” *State v. Motter*, 139 Wn.App. 797, 802,n.3, 162 P.3d 1190 (2007); RAP 2.5(a).

Here, a new trial is no remedy for the violation. Mr. Hand provided both constitutional and statutory grounds for dismissal under the due process clause and CrR 8.3. The remedy for an unconstitutional delay in providing statutorily mandated and court ordered restorative treatment can only be remedied by a dismissal with prejudice.

D. This Court Is Authorized To Decline To Impose Appellate Costs.

RAP 15.2(f) provides the appellate court will give a party the benefits of an order of indigency throughout review unless the appellate court finds the party’s financial condition has improved to the extent that the party is no longer indigent. Similarly, RAP 14.2 provides, in pertinent part: When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

Here, there is no evidence that Mr. Hand's financial circumstances have improved. Mr. Hand respectfully asks this Court to exercise its discretion and decline to impose appellate costs if Mr. Hand does not substantially prevail on appeal and the state submits a cost bill. RCW 10.73.160(1).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Hand respectfully asks this Court to reverse his convictions and dismiss all charges with prejudice.

Dated this 1st day of March 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Anthony Hand, do hereby
certify under penalty of perjury under the laws of the United States
and the State of Washington, that a true and correct copy of the
Appellant's Reply was sent by first class mail, postage prepaid on
March 1, 2017 to:

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And by electronic service by prior agreement between the parties
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